IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 419.

THE TERRITORY OF NEW MEXICO, ex rel. CALEDONIAN COAL COMPANY, *Appellant,*

*vs.*

BENJAMIN S. BAKER, Associate Justice of the Supreme Court of the Territory of New Mexico and Judge of the Second Judicial District Court thereof, *Appellee.*

No. 419.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

## BRIEF FOR APPELLEE.

### STATEMENT.

As the present proceeding is an indirect method of reviewing the ruling of the District Court of New Mexico upon the motion to quash the service of summons in respect to the Santa Fe Pacific Railroad Company in the action brought therein by the relator, it would seem that the petitioner ought to have attached to its application for mandamus a certified copy of the entire record of the action pending in the District Court, in order that the Supreme Court might determine therefrom whether the District Court erroneously ruled or not upon the motion. This was not done, and the case simply stands

upon the answer of the respondent. It does not appear whether there was any statement or charge in the declaration or pleadings, filed in the case pending in the District Court, that the Santa Fe Pacific Railroad Company was at the time of the institution of the suit or attempted service upon its president engaged in transacting its business as a common carrier within the territorial limits of the District Court, nor that it had any agency or agent representing it therein. The return upon the summons served, which is set forth in the petition, does not show that the Santa Fe Pacific Railroad Company was at the time doing business in the territory or that Mr. Ripley was representing it therein as its president. There is nothing from the return which would show that that corporation was at the time within the territorial jurisdiction of that court or that the service was valid. It is admitted in the petition that the Santa Fe Pacific Railroad Company had, prior to the institution of the action pending in the District Court, sold its railroad to The Atchison, Topeka and Santa Fe Railway Company under authority of congress; that it simply owned certain lands within the said judicial district, and that there was still pending in the District Court of Bernalillo County, New Mexico, suits relating to the title and right of possession to parcels of said lands. The evidence introduced on the motion to quash showed that these suits had been instituted prior to the sale of its railroad, and, therefore, prior to the institution of the action in question, so that it appears that there was then simply pending certain actions in ejectment against trespassers upon its property in the Territory of New Mexico. It appeared conclusively and was admitted that the Santa Fe Pacific Railroad Company had no office or place of business in

the Territory of New Mexico at the time of the institution of the action; that it was not then operating any railroad or engaged in business as a common carrier in said district; that no place was fixed in its articles of incorporation for the keeping of its principal office or place of business, but that its by-laws required annual meetings of its board of directors to be held at the office of said company in the City of New York; that the summons was served upon its president, Mr. Ripley, while he was passing through the Territory of New Mexico as a passenger upon one of the trains of The Atchison, Topeka and Santa Fe Railway Company; that its land commissioner has his office in the City of Topeka, State of Kansas, and President Ripley has and has had his office in the City of Chicago, State of Illinois.

The Santa Fe Pacific Railroad Company was organized by purchasers of the railroad and property of the Atlantic and Pacific Railroad Company, under foreclosure proceedings instituted against the latter, under an act of Congress approved March 3, 1897 (29 U. S. Stats. at Large, p. 622 *et seq.*) entitled "An Act to define the rights of purchasers under mortgages authorized by an act of Congress, approved April 20, 1871, concerning the Atlantic and Pacific Railroad Company." Under this act, the Santa Fe Pacific Railroad Company at that time acquired the railroad of the Atlantic and Pacific Railroad Company extending from Albuquerque to California, and such of its lands as had been acquired under its land grant and which remained then undisposed of, together with the rights, powers, privileges, grants and franchises granted to the Atlantic and Pacific Railroad Company by a previous act of Congress. Prior to the institution of the action in question and under authority

of an act of Congress approved June 27, 1902, entitled "An Act authorizing the Santa Fe Pacific Railroad Company to sell or lease its railroad, property and franchises, and for other purposes" (32 U. S. Stats. at Large, Part I, page 405), which required such sale to be made on or before January 1, 1904, said railroad company sold and conveyed its railroad property to The Atchison, Topeka and Santa Fe Railway Company, and was not, therefore, engaged at the time of the service of summons in the business of a common carrier for which it had been incorporated.

In the absence of a complete record of the action pending in the District Court, every presumption is in favor of the validity of the ruling of the District Court upon the motion to quash.

Relator's application for a writ of mandamus to the judge of the District Court to assume jurisdiction over the Santa Fe Pacific Railroad Company, being heard upon the petition or application and answer, was denied upon the grounds stated in the opinion of the Territorial Supreme Court, reported in the case of *Territory ex rel. Caledonian Coal Company* v. *Baker, Justice, et al.*, 78 Pacific Reporter, page 624 *et seq.* This is an appeal from an order of the Territorial Supreme Court dismissing said application.

## ARGUMENT.

The main question for consideration is—Does it sufficiently appear that the District Court obtained jurisdiction in a personal action so as to enable it to render a personal judgment against the Santa Fe Pacific Railroad Company by the service made on its president while he was casually passing through the district and was not at the time representing the railroad company? Was the railroad company so identified with its president at the time in that district, or, in other words, was it so impersonated in him at that time and place, as to render the service of summons upon him a service upon it so as to subject it to the orders or judgments of that court?

Under our system, courts are constituted to administer the law as between litigants who are found or come within the territory over which such court is given jurisdiction, and while its process may affect property rights within its territorial jurisdiction where authorized, its process does not run outside of such limits so as to affect persons beyond those limits, unless the legislative authority creating the particular court expressly so authorizes and such legislative authority may be exercised over such other territory.

In the act creating the Territory of New Mexico, approved September 9, 1850, we find provided in Section 10 (9 U. S. Stats. at Large, page 449), that that territory was divided into three judicial districts, and that a district court should be held in each of said districts. By Section 16 of the same act, same statutes, page 452, the method for defining the territorial limits of these judicial

districts was prescribed. Section 1030, page 336, of the Compiled Laws of New Mexico, 1897, defines the territorial limits of each of the judicial districts in that territory.

It was, therefore, stated by Mr. Justice Gray, in delivering the opinion of this court, in the case of *Goldey* v. *Morning News,* 156 U. S. 521:

> "It is an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service."

The same principle had been tersely announced by Mr. Justice Jackson in the case of *Mexican Central Railway* v. *Pinkney,* 149 U. S. 209, as follows:

> "But it is well settled that no court can exercise, at common law, jurisdiction over a party unless he is served with the process within the territorial jurisdiction of the court, or voluntarily appears."

See, also:

*Harris* v. *Hardeman,* 14 How. 339.

A corporation having but an artificial existence can only act through or be represented by agents. The authority and power of such agents to represent the corporation are necessarily limited, and this is true of the president of the corporation. He is an agent with limited authority in respect to representing the corporation. He is not the corporation and does not carry it about with him on his journeys.

Generally speaking, the board of directors, in meetings duly had, represents and acts for the corporation in

the general management of the corporate business. But even such board does not in all respects represent the legal entity, the corporation.

In speaking of the jurisdiction over a foreign corporation by service of process upon its president while temporarily in the state for either business or pleasure, the Supreme Court of Pennsylvania, in the case of *Phillips et ux* v. *Burlington Library Company*, 141 Pa. St. 462; s. c. 21 Atl. 640. said:

> "Under such circumstances he (the president) is not here in his representative capacity. He is not the corporation, nor does he bring it here. If the rule were otherwise, he would carry the corporation with him upon a trip around the world, and subject it to the jurisdiction of every country he might visit. We will not designate such a proposition as absurd, but it certainly has not a shadow of reason to sustain it."

If the rule were otherwise, the president of this corporation, while on a pleasure trip to Alaska or the Philippine Islands, or while in such place on the business of some other corporation of which he might be an officer, might subject this corporation to the process of the courts of those territories. A mere statement of the proposition should be sufficient to show its unreasonableness.

A corporation can be said to have a technical habitat or place of residence only in the state or district where its corporate meetings are held.

*Galveston, Harrisburg & San Antonio Ry. Co.* v. *Gonzales*, 151 U. S. 496.

*Interstate Commerce Commission* v. *Texas & Pacific Ry. Co.*, 57 Fed. 949.

*Jones* v. *Scottish Accident Ins. Co.*, L. R., 17 Q. B. Div. 421.

*Watkins* v. *Scottish Imperial Ins. Co.*, L. R., 23 Q. B. Div. 285.

*Frick Co.* v. *Norfolk & O. R. Co.*, 26 Fed. 725.

As a corporation created in one state was regarded as having no legal existence outside the limits thereof, so it was first held that it could not be sued in another state, but inasmuch as it could only do business in such other state by the license or permission of such state, it was finally held that where it did business there and the statutes of such state authorized or directed a service upon it by service upon a resident agent, the corporation by engaging in business there impliedly consented to be served in that manner and to be bound by such service.

So it was stated in the early case of *Lafayette Insurance Co.* v. *French,* 18 How. on page 408:

> "For the purpose of receiving such service and being bound by it, the corporation is identified with such agent or officer."

Of course, a federal corporation does not exercise its rights or transact its business by leave or license of any state or territory, and the same reasoning would not apply. It is not necessary, however, to stand upon that position in this case, since, under general principles, the service in question would not be recognized as valid, even in a collateral proceeding. It is now well settled that the service of summons, even upon the president of a corporation while temporarily in a state or district in which the corporation is not at the time transacting its business, is not a valid service upon the corporation, even though the local laws should authorize the same, because such president does not then represent that corporation and the corporation is not itself, by any authorized agent

for such purpose, within the territorial jurisdiction of the court.

This, in effect, was decided in an elaborate and well-considered opinion by the late Mr. Justice Field, in *Saint Clair* v. *Cox*, 106 U. S. 350.

See, also, the more recent opinion of the late Mr. Justice Gray, in *Goldey* v. *Morning News*, 156 U. S. 518.

*Fitzgerald Construction Company* v. *Fitzgerald*, 137 U. S. 106.

*Mecke* v. *Valleytown Mineral Company*, 93 Fed. 697.

Beale on Foreign Corporations, Sec. 270.

Neither can it make any difference even though the corporation at some period prior to the service had been engaged in business in the particular state or district, or that some officer of the corporation had at all times resided therein. The corporation has the right to withdraw from the state or district, and when it is no longer represented in such state or district by an agent transacting therein its ordinary business, it cannot be said to be present therein at the time.

See:

*Conley* v. *Mathieson Alkali Works*, 190 U. S. 406.

*Geer* v. *Mathieson Alkali Works*, 190 U. S. 428.

*DeCastro* v. *Compagnie Francaise Du Telegraphe, etc. Company*, 76 Fed. 426.

*Earle* v. *Chesapeake & Ohio R. Co.*, 127 Fed. 235.

*Cady* v. *Associated Colonies*, 119 Fed. 420.

*Eldred et al.* v. *American Palace-Car Company*, 105 Fed. 455.

Beale on Foreign Corporations, Secs. 281 and 279.

It is not neecssary here to notice cases in which, by particular statute, a state may have required a foreign corporation to appoint or designate a particular agency within such state upon whom process might be served in suits arising out of the business transacted therein. In some cases, no doubt, the appointment under some such statute might be construed as irrevocable.

But it is claimed that the Sante Fe Pacific Railroad Company still owns lands within the territory of New Mexico. This it may do, however, without being represented therein by any authorized agency. By owning or holding lands in such district it is not to be regarded as doing or transacting its business therein.

*Missouri Coal & Mining Co.* v. *Ladd,* 160 Mo. 435; s. c. 61 S. W. Rep. 191.

The court of a proper district might, in such proceedings as were authorized by law, and in special cases, obtain jurisdiction over the property of a corporation within the territory, but it could not obtain jurisdiction over the corporation in a personal action by reason of that fact.

The test is—Has the corporation an agency within the district transacting therein its ordinary business so that it may be said to be impersonated in or represented by such agency for general purposes, including its subjection to the service of process therein?

In *Saint Clair* v. *Cox,* 106 U. S., on pages 351 and 352, it appeared that the corporation in that case had property within the district in which the suit was brought and personal judgment rendered, but the judgment was held invalid notwithstanding that fact.

The same fact also appeared in *United States* v.

*American Bell Telephone Company,* 29 Fed. 17. In an elaborate opinion therein by the late Mr. Justice Jackson of this court, then Circuit Judge, he sums the matter up, on pages 34 and 35, as follows:

> "We think the decisions of the Supreme Court have settled and established the proposition that, in the absence of a voluntary appearance, three conditions must concur or co-exist in order to give the federal courts jurisdiction *in personam* over a corporation created without the territorial limits of the state in which the court is held, viz.: (1) It must appear as a matter of fact that the corporation is carrying on its business in such foreign state or district; (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such state; and (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there as a condition, express or implied, of doing business in the state."

In other words, to give the court jurisdiction, there must be within the district an agent who is at the time representing the corporation carrying on its ordinary business, and such agent must be served with the process.

Neither can it make any difference if it should appear that the corporation was still prosecuting pending suits against trespassers upon its lands, nor does it make much difference whether such suits were pending at the time of the service of process in the particular case or instituted thereafter. It must be assumed that in the prosecution of such suits the corporation is represented by some attorney at law, but such attorney would represent the corporation only in and for the purposes of such particular suits, and for the purpose of prosecuting such particular suits the corporation can only be regarded as voluntarily entering its appearance in the courts of such

district. It cannot be assumed that by so suing to protect its property rights it submits itself generally to the jurisdiction of the courts of that district, so as to authorize an independent suit or proceeding to be instituted against it. It would hardly be pretended that a service of a summons in an independent suit could be validly made upon an attorney at law who was only appearing and was only authorized to represent the corporation in some pending litigation which had no possible connection with a suit subsequently instituted against it.

By prosecuting such suits it is not doing business in the territory.

*McCall* v. *Mortgage Co.*, 99 Ala. 427; s. c. 12 South. 806.

*St. L., A. & T. Ry. Co.* v. *Fire Assn.*, 55 Ark. 163; s. c. 18 S. W. 43.

*Utley* v. *Mining Co.*, 4 Colo. 369.

It is, therefore, not "found" in the territory by reason of the pendency or bringing of suits.

It will be claimed, however, that as the Santa Fe Pacific Railroad Company was organized under an Act of Congress and is, therefore, a federal corporation, it is an inhabitant or a domestic corporation of the territory. It is not a domestic corporation of New Mexico in the sense that it was created by the laws of that territory, or that it owes its existence to such laws. It could hardly be regarded as an inhabitant of or domiciled within every state and territory of the United States merely by reason of being a federal corporation.

Being incorporated by Congress, it may be technically regarded as a citizen of the United States, as a coporation incorporated under the laws of a particular state is regarded as a citizen of such state. This, however,

would not make it a citizen of every or any state in the Union. Neither could it be regarded as a resident in any state or territory unless, indeed, its corporate offices were located and held therein.

It is true that in the case of *Commonwealth* v. *Texas & Pacific Railroad Company*, 98 Penn. St. 90, the Supreme Court of Pennsylvania held that the Texas and Pacific Railroad Company, being chartered by Congress, was not a foreign corporation within the meaning or intendment of the statute of that state imposing a license tax upon foreign corporations doing business in that state, since the statute pointed out what corporations were to be regarded as foreign corporations and did not include therein those chartered by Congress. This decision seems to be the basis of some error in certain courts holding that a federal corporation was to be regarded as a domestic corporation in every state in which it carried on its business. Of course, the Pennsylvania case might properly have been decided upon the ground that a state could not validly tax a federal corporation for the privilege of transacting its business therein, since such corporation did not derive that right or privilege from such state.

The real test, after all, is—Is the corporation in question personally within the territorial limits of the court from which the process issues? Is it there by an agent who is at the time representing it in the transaction of its ordinary business so that it might be inferred that the corporation has consented to be subjected to the jurisdiction of the particular court by service upon some officer or agent who might be found therein, and, who, at the time, is representing it in the transaction of its business?

But it will be claimed that the jurisdiction of the territorial court over the controversy and, therefore, over parties thereto is the same as that conferred upon the United States Circuit Courts in like cases, and that the suit in question is one to recover damages for an alleged violation of the Interstate Commerce Law and of the Sherman Anti-Trust Law. In Section 10 of the Act approved September 9, 1850 (9 United States Statutes at Large, p. 450), creating this territory, it was provided:

> "And each of the said District Courts shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States, * * * and the first six days of every term of said courts, or so much thereof as shall be necessary, shall be appropriated to the trial of causes arising under the said Constitution and laws," etc.

A general provision of this nature is found incorporated in Section 1910 of the United States Revised Statutes.

As this jurisdiction of the District Court is evidently invoked in this case, it is, perhaps, not proper at this time or in this collateral proceeding to determine whether the jurisdiction over this particular controversy does in fact exist or not,—that is, whether Section 1910 above vests in such District Courts jurisdiction over controversies which, by subsequent Acts of Congress, is vested exclusively in the Circuit or District Courts of the United States. It is evident, however, that for the purpose of assuming jurisdiction over such controversy, the Territorial Court could only assume like jurisdiction over the person of a defendant thereto as is given Circuit Courts of the United States in such cases.

Section 9 of the Interstate Commerce Law, approved

February 4, 1887 (24 United States Statutes at Large, p. 382), provides, that any person claiming to be damaged by a violation of the provisions of that Act may bring suit for the recovery of such damages for which the common carrier may be liable under the provisions of that Act, "in any District or Circuit Court of the United States of competent jurisdiction."

A Territorial District Court is neither a "District or Circuit Court of the United States."

*Reynolds* v. *United States,* 98 U. S. 145, 154.
*McAllister* v. *United States,* 141 U. S. 174, and authorities cited in the opinion of Mr. Justice Harlan.

What is a court of "competent jurisdiction," referred to, is defined by the general Act of March 3, 1887, defining the jurisdiction of the Circuit Courts, and in a controversy of this nature a defendant thereto could only be sued in a district whereof he is an inhabitant.

*Union Switch and Signal Company* v. *Hall Signal Company,* 65 Fed. 625.

So far, however, as the count in the declaration concerning recovery of damages growing out of an alleged violation of the Sherman Anti-Trust Act is concerned, by Section 7 of that Act, such suit may be brought "in any Circuit Court of the United States in the district in which the defendant resides or is found."

Act of July 2, 1890, Chap. 647, Sec. 7 (26 U. S. Stats. at Large, p. 210).

The words "is found," used in said section, were also used in the Act of 1875, concerning the jurisdiction of the United States Circuit Courts, and has been frequently defined in respect to service upon corporations. The

general principles announced in the cases heretofore cited have been strictly adhered to in construing such provision. A corporation is not deemed to be "found" within a district, unless it is transacting therein its ordinary business through an agent who is there representing it in the conduct of its business.

See:

*United States* v. *American Bell Telephone Company*, 29 Fed. 34, followed and approved by Mr. Justice Brown, of this court, then District Judge, in *Maxwell* v. *A., T. & S. F. R. R. Co.*, 34 Fed. 286, 289.

*Bentlif* v. *London and Colonial Finance Corporation*, 44 Fed. 667.

*Clews* v. *Woodstock Iron Company*, 44 Fed. 31.

*St. Louis Wire-Mill Company* v. *Consolidated Barb-Wire Company and others*, 32 Fed. 802.

*Good Hope* v. *Railway Barb Fencing Company*, 22 Fed. 635.

The Sante Fe Pacific Railroad Company having been organized mainly for the purpose of acquiring and operating the railroad formerly owned by the Atlantic and Pacific Railroad Company and engaging in the business of a common carrier, when it disposed of this railroad and ceased that business and no longer had any office or place of business within the territory, it is obvious that it was not "found" in the territory or represented therein by any authorized agent merely because its president was casually passing through the same. Its holding of land in the territory was merely incidental, but the holding or disposing of the same did not require it to have an agent in the territory, and it does not appear that there was

any agent there for that purpose. Neither can its prosecution of suits through an attorney at law be regarded as an implied consent on its part to be subjected generally to suits arising out of entirely independent matters. The service was, therefore, unquestionably invalid and was properly set aside. Even assuming, therefore, that this court has jurisdiction upon this appeal, which may be questioned, it is clear that the order of the Supreme Court of the Territory dismissing the application for a mandamus was correct and should be affirmed.

Respectfully submitted.

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